DR MUNAWAR AHMAD ANESS

v.

KETUA PENGARAH PENJARA, MALAYSIA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPLICATION NO: 44-105-98]
15 JANUARY 1999

CRIMINAL PROCEDURE: *Information - Application for detailed schedule of visitors from date of arrest of applicant - Whether applied under specific provision - Whether failure to do so impedes application*

CRIMINAL PROCEDURE: *Information - Application for detailed schedule of visitors from date of arrest of applicant - Purpose of application - For information to be used in a pending appeal - Application filed separately from the appeal - Likelihood of a different court hearing application from that hearing appeal - Whether such a circumstance desirable*

CRIMINAL PROCEDURE: *Information - Application for detailed schedule of visitors from date of arrest of applicant - Whether provided for under Prisons Rules - Whether s. 76 of Evidence Act 1950 applicable - Whether applies only in relation to a document that is existing*

The applicant was convicted before the Sessions Court wherein he was later sent to the Kajang prison. Because of failing health, he was transferred from the Kajang prison to the hospital. Counsel for the applicant requested from the authorities concerned for a detailed schedule of visitors, police or otherwise, from the time the applicant was arrested and brought to the Sessions Court and from the time he was transferred from the Kajang prison. There was no reply from the said authorities. Hence, the instant application for the matters so requested.

Before the court dealt with the application proper, the Deputy Public Prosecutor argued that the application was unclear as to under what provision it was made. Against this, the applicant argued that the title to the application showed clearly that it was an application under the Prisons Act, the Prisons Rules, the Lock-Up Rules and the inherent jurisdiction of the court.

Held:

[1] The application lacked specificity as to the provisions it relied upon. Such a failure can hinder a party's ability to prepare adequately an answer and even submissions. Where the lack of clarity embarrasses a party, the court may either dismiss the application or order an adjournment as it thinks just in the circumstances of the case.

[1a] There was no indication that the respondents were so embarrassed as to be unable to reply to or submit upon the application or that it would be unfair to allow the application to be proceeded with. Also, the objection had a bearing on the consideration of the issues in the application, and could suitably be considered in the context of the application as a whole. Therefore, the preliminary objection was dismissed and the issues raised in the objection taken into consideration in dealing with the application itself.

[2] The application did not state what the documents sought were for. The supporting affidavit and a reference in the intitulement indicated that the information was to be used for the preparation of a pending appeal. If so, the application was analogous to an interlocutory application. Being filed separately from the appeal, it would result in the likelihood of a different court hearing the application from that hearing the appeal itself. Such a circumstance was undesirable.

[3] A refusal to give a certified copy or allow inspection should be a matter of an appropriate application in the civil jurisdiction. A court in the criminal division confines itself to criminal jurisdiction. Only if such application relates directly to a criminal matter may the application be made in that criminal matter and in the court hearing that criminal matter. As such, the application must be made in the criminal appeal file to ensure that the court hearing the appeal deals with it as with all matters relating thereto.

[4] The application was for the production of a detailed schedule by the respondents and the existing authorities are only in relation to the production of relevant extracts of records or journals, not a detailed schedule as applied for. For these reasons alone, the application should be rejected.

[5] The Prisons Rules do not provide for records kept under the Rules to be produced to any person other than for the use of the prison authorities. That being the case, authority for the production of the information as desired by this application must be sought elsewhere.

[6] Section 76 of the Evidence Act 1950 applies to a public document which the applicant has a right to inspect and upon payment of the legal fees therefor. Therefore, the applicant must show that it was a public document, that he had a right to inspect it and that he had tendered the legal fee therefor.

[6a] A record of matters that a public officer is required by law to maintain is a public document even though it may be a record of acts of visitation by other persons. Further, there was nothing in the Prisons Act and Rules and the Lock-Up Rules that conferred a right upon the applicant to inspect the said records. Reliance was entirely upon ss. 74 and 76 of the Evidence Act 1950. Also, there was no undertaking or offer to pay any fees in the letters to the respondents. The orders applied for did not provide that the orders were subject to the payment of any relevant fees.

[7] The document must be a document that is existing, being the act or the record of the acts of the public officer. Then only does s. 76 of the EA provide for certified copies of that public document to be made. There was clearly no provision to require the public officer to prepare a "jadual terperinci". This application was not for any record that demonstrably existed.

[8] As to the other defects in the application, there was no sign of the usual cure-all prayer "and such other orders as the Court thinks fit". That would have allowed the court to consider other orders.

[Application dismissed.]

Case(s) referred to:
Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 ***(refd)***
Chua Qwee Teck v. PP [1991] 3 MLJ 411 ***(refd)***
Dato Mokhtar bin Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Heyne v. Fischell 30 TR 190 ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 436 ***(refd)***
R v. Coventry Crown Court 67 Cr App R 315 ***(refd)***
R v. Huntingdon Justices 1981 Divisional Court 194 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 5, 51, 317
Courts of Judicature Act 1964, s. 61(4)
Evidence Act 1950, ss. 35, 74, 76, 77
Lock-Up Rules 1953, r. 34
Prisons Rules 1953, rr. 34(1), (2), 212, 213, 214

Other source(s) referred to:
Criminal Pleadings, Evidence and Practice, Archbold, 1997
Sarkar on Evidence, 14th edn, p 1078

For the appellant - Manjit Singh Dhillon (Balwant Singh Sidhu with him); M/s Balwant Singh Sidhu & Co
For the respondents - Mohd Yusof Hj Zainal (K Muniandy & Zauyah Bee with him) DPP

Reported by Kavitha Gunasegaran

JUDGMENT

Abdul Wahab Patail J:

The Background

According to his affidavit dated 22 October 1998 in support of this application, the applicant, Dr Munawar Ahmad Aness was arrested on the morning of 14 September 1998. He complained of chest pains on 14 September and was taken to the General Hospital Kuala Lumpur on the 15 September. He was brought before the Sessions Court, Kuala Lumpur on 19 September 1998. He was sent the same day to Kajang Prison. Because of failing health, he was sent to the National Heart Institute and later transferred to the coronary rehabilitation ward at Ward 29 at the Kuala Lumpur General Hospital. There was an incidental mention of a conviction and sentence recorded on 19 September 1998.

On 6 October 1998 the solicitors for the applicant, Messrs Balwant Singh Sidhu & Co., wrote to the Pengarah, Penjara Kajang. The relevant portion is as follows:

> Untuk tujuan-tujuan Rayuan Dr. Munawar di Mahkamah Tinggi Kuala Lumpur, kami perlu mendapatkan pengesahan (confirmation) tentang:
>
> 1. Tanda Pengenalan (identiti);
> 2. Tarikh dan waktu; dan
> 3. Tujuan
>
> semua pelawat-pelawat Dr. Munawar (termasuk pihak polis dan orang awam dan peguam-peguam, bermula dari 20hb September 1998 hingga ke hari ini. Keterangan-keterangan ini boleh di didapati dari sebuah buku laporan (logbook) yang diselenggarakan oleh pegawai-pegawai Tuan di Wad 29 Hospital Besar Kuala Lumpur.

On 14 October 1998 the said solicitors wrote to the Inspector General of Police. The relevant part of the letter is as follows:

> Bagi tujuan-tujuan rayuan Dr. Munawar ke Mahkamah Tinggi Kuala Lumpur kami perlu mengesahkan semua pergerakan Dr. Munawar di antara 14 haribulan September 1998 hingga 19 haribulan September 1998. Kami ingin menarik perhatian tuan kepada Kaedah 34(2) Lockup Rules, 1998 dan journal yang perlu di simpan di bawah Kaedah tersebut.
>
> Sila mengesahkan secara tulisan semua gerakan Dr. Munawar di dalam dan di luar lokap dan secara khas:
>
> 1. identiti orang/semua orang yang membawa beliau ke luar dari lokap;
> 2. tarikh dan waktu pindahan (removal) tersebut;

3. maksud pindahan (removal) tersebut;

4. tarikh dan waktu kepulangan (return); dan

5. lokasi lokap.

There being no response, the applicant filed this application in the afternoon of 23 October 1998 for orders as follows:

1. Bahawa Inspektor-General Polis, Malaysia memberikan suatu jadual terperinci berkenaan segala pergerakan Dr. Munawar Ahmad Aness dari waktu penahanan beliau pada 14 September 1998 hingga pada waktu beliau dibawa ke Mahkamah Sesyen Kuala Lumpur pada 19 September 1998 di mana beliau telah dituduh dalam Kes Tangkap No. 62-134 of 1998 dan bahawa keterangan lanjut yang diberikan termasuklah:

(i) Tarikh dan waktu pergerakan atau pemindahan;

(ii) Identiti pegawai-pegawai yang membawa beliau atau yang memindahkan beliau;

(iii) Tujuan membawa beliau atau tujuan memindahkan beliau;

(iv) Tempat beliau dibawa.

2. Bahawa Ketua Pengarah Penjara, Malaysia memberikan suatu jadual terperinci mengenai semua pelawat-pelawat, polis dan bukan polis, yang diterima oleh Dr. Munawar Ahmad Aness dari waktu beliau dipindahkan dari penjara Kajang pada 19 September 1998 hingga ke tarikh Perintah tersebut.

It is this application we are concerned with today.

The Preliminary Objection

At the outset Encik Mohd Yusof Zainal, the DPP had argued that the application is unclear as to under what provision it is made. In theory such an application could be made under s. 51, 317 of the Criminal Procedure Code (CPC), or through s. 5 CPC, the relevant English law.

It was submitted that an application under s. 51 must be made in the court that is conducting the proceeding (*PP v. Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 SC), which in the circumstances of this case means the High Court hearing the appeal. The application cannot stand on its own. Further, the section refers to "property or document", in other words, something that must pre-exist, and not something that has to be prepared.

It was submitted that if it were made under s. 317 CPC, the evidence must be in relation to the offence or charge, but not to other matters. It was submitted that the current circumstances is closer to the circumstances envisaged in s. 61(4) of the Courts of Judicature Act 1964 which however is applicable to the Court of Appeal only.

The Senior DPP further submitted that the application could be relying on s. 5 CPC, that English law may be adopted to the extent it does not conflict or be inconsistent with the CPC and can be made auxiliary thereto. In such case, it was submitted that in *R v. Coventry Crown Court* 67 Cr App R 315 DC, it was held that the power is confined to what went on before the court.

As to the procedure, Archbold on *Criminal Pleadings, Evidence and Practice* 1997 stated that the court may only consider the application if an affidavit is filed to show that the plea was equivocal. The application thus should be by way of a notice of motion with a supporting affidavit. *R v. Huntingdon Justices* 1981 Divisional Court 194 and *Chua Qwee Teck v. PP* [1991] 3 MLJ 411, were cited as illustrations.

Mr Manjeet Singh had maintained in his reply there was no suggestion in his application of reliance upon any of the provisions argued by the Senior DPP. The title to the application, he argues, shows clearly it is an application under the Prisons Act, the Prisons Rules, the Lock-up Rules, and the inherent jurisdiction of the court. He argued that the applicant is asking for documents kept and maintained by the prisons officers in the discharge of their duties, that where such documents are such as where the applicant has a clear interest because they are concerned with his freedom and liberty, he has a right.

Mr Manjeet Singh said that an application under s. 317 would be forthcoming after the applicant has collected the necessary information and documents to support the application. For that reason it was premature to raise s. 317 in objection. Mr Manjeet argued that there is abundant authority in Malaysia as to setting aside a plea of guilty when it is equivocal, but that is not the question before the court in this application. He emphasised that the application before the court is distinct from an application under s. 317 which would be made in due course, and equally, and appeal as to whether the plea is equivocal or otherwise would be an issue before the court but not on this day.

The application is intituled as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
(BAHAGIAN JENAYAH)
PERMOHONAN JENAYAH PELBAGAI NO. 44-105 TAHUN 1998

Dalam perkara Rayuan Jenayah
Mahkamah Tinggi Kuala Lumpur
(Bahagian Jenayah) No. 42-44-1998 Dr.
Munawar Ahmad Aness lwn PR

Dan

Dalam perkara perbicaraan Jenayah Mahkamah Sesyen Kuala Lumpur No. 62-134-1998 PR lwn Dr. Munawar Ahmad Aness

Dan

Dalam perkara Akta Penjara, 1995

Dan

Dalam perkara Lock-Up Rules 1953 dan Prison Rules 1953

Dan

Dalam perkara bidangkuasa sedia ada Mahkamah Tinggi Malaya

Antara

Dr. Munawar Ahmad Aness ... Pemohon

Dan

1. Ketua Pengarah Penjara, Malaysia
2. Inspektor-Jeneral Polis, Malaysia
3. Kerajaan Malaysia … Responden-responden

Other than the mention in the title above, there is no reference to the Prisons Act, the Prisons Rules, or the Lock-up Rules in the application. The statement of the Act or the aforesaid Rules relied upon in the title is of a general nature. It must be noted that the Prisons Rules and the Lock-up Rules only provide the provisions for prison conditions and procedures and for the purpose of which certain journals are maintained. Other than the reference to "perkara bidangkuasa sedia ada Mahkamah Tinggi Malaya", there is no suggestion in the application as to whether the applicant is relying on the sections mentioned in the CPC or as Mr Manjeet Singh asserts now in submissions, in the Evidence Act 1950, as the basis the application is made.

The preliminary objection and the answer to the objection shows a lack of specificity as to the provisions it relies upon.

While the substance of the application may well lie within the Prisons Rules and the Lock-up Rules, the application does not show whether it is an application under the provisions of the Criminal Procedure Code or the Evidence Act 1950. Such a failure can hinder a party's ability to prepare adequately an answer and even submissions. A fair hearing can only take place if the parties are fairly apprised of the issues they have to answer and submit

upon, and it ultimately reflects upon the quality of justice that can be achieved. It is only fair that the applicant makes clear what he relies on. For that reason where the lack of clarity embarrasses a party, the court may either dismiss the application or order an adjournment as it thinks just in the circumstances of the case.

I had ordered that I would hear the application proper and rule upon the preliminary objection at the end of the submissions. I do so now. Since a) there is no indication in this case that the respondents are so embarrassed as to be unable to reply to or submit upon the application or that it would be unfair to allow the application to be proceeded with, b) these objections nevertheless have a bearing on the consideration of the issues in this application, and c) can suitably be considered in the context of the application as a whole, I would dismiss the preliminary objection but take account of the arguments in dealing with the application as if the arguments were taken in the application itself.

I proceed now to deal with the application itself.

The Application

The submissions were extensive in scope. I do not propose to deal with all of the matters raised in the submissions. It is only necessary in this decision to deal with the issues directly concerning this application for the reasons that will become apparent.

Taking the issues raised in preliminary objection into consideration, I would reformulate the questions in this application before the court as follows:

1. Whether an application for records maintained under the Prisons Rules and the Lock-up Rules can be made as an independent application.

2. Whether this application is for records maintained under the relevant provisions of the Prisons Rules and the Lock-up Rules.

3. Whether the Prisons Rules and the Lock-up Rules give any right to inspection of its records.

4. Whether the application can be made under the Evidence Act 1950.

The First Question

Assuming the application is properly made, be it under the Prisons Act, the respective Rules or under the Evidence Act, the first question is whether the application may be made as an independent application. This application has been made as a general criminal application. The application itself does not

state what the documents sought are for. Paragraphs 17 and 20 of the supporting affidavit and a reference in the intitulement indicates that the information is to be used for the preparation of a pending appeal.

If so, then the application is analogous to an interlocutory application. Being filed separately from the appeal, it would result in the likelihood of a different court hearing the application from that hearing the appeal itself. It results in one court deciding upon matters relating to a matter before another court of concurrent jurisdiction. Such a circumstance is undesirable. We must be concerned that the independence of that court in making its decision must be maintained. The court hearing the appeal 42-44-98 must be allowed to deal with all of the matters or applications relating to that appeal.

What then if a request for a certified copy to which an applicant is entitled is refused even upon the undertaking to pay the legal fee therefor? In such a case, there may well have been a denial of a right, for which in the normal course a civil action may lie.

Section 76 itself is of a general nature and is not confined to criminal cases. It does not require that an action or suit be in existence before an applicant may seek a copy. Ordinarily a refusal to give a certified copy or allow inspection should be a matter of an appropriate application in the civil jurisdiction. A court in the criminal division confines itself to the criminal jurisdiction. Only if such application relates directly to a criminal matter may the application be made in that criminal matter and for the reason above, in the court hearing that criminal matter.

For these reasons I conclude that the application must be made in the criminal appeal file to ensure that the court hearing the appeal deals with it as with all matters relating thereto.

The Second Question

The factual basis in respect of the First and the Second Respondents differ slightly.

(a) The First Respondent

The application against the First Respondent is for:

> Bahawa Ketua Pengarah Penjara, Malaysia memberikan suatu jadual terperinci mengenai semua pelawat-pelawat, polis dan bukan polis, yang diterima oleh Dr. Munawar Ahmad Aness dari waktu beliau dipindahkan dari penjara Kajang pada 19 September 1998 hingga ke tarikh Perintah tersebut.

The application is for a detailed schedule of visitors, police or otherwise, from the time the applicant was transferred from Kajang Prison on 19 September 1998. Are records of this nature maintained by the Prisons. Now r. 213 of the Prisons Rules provide:

> 212. The Officer-in-Charge shall keep a journal wherein he shall record all matters of importance relating to the prison or prisoners, and such matters of which he is directed to keep a record by these rules.
>
> 213. Every Officer-in-Charge shall be responsible for seeing that proper records are kept of all such circumstances, and of any correspondence connected with such circumstances, as affect the interests of particular prisoners, and shall bring the cases to the notice of the Commissioner after such time, or at such intervals, as may be proper in each case.

There is no evidence to suggest that such a detailed schedule as requested in the application is actually maintained under r. 213 by the Prisons as a circumstance that affects the interests of the prisoner. Rule 212 requires that a journal of the Officer-in-Charge's actions for example under r. 214 be kept but here again there is nothing in the rules that require a detailed schedule of visitors be maintained.

Secondly and more importantly, the application is for a detailed schedule of visitors, police and civilian "yang diterima oleh Dr Munawar Ahmad Aness dari waktu beliau dipindahkan dari penjara Kajang pada 19 September 1998 ke tarikh perintah tersebut.". There is no evidence whatsoever the applicant was moved from the Kajang Prison on 19 September 1998 as asserted in the application. In fact para. 18 of his affidavit asserts he was sent to National Heart Institute from Kajang Prison on 23 September 1998 and from there he was transferred to Kuala Lumpur General Hospital. Paragraph 198 of the statutory declaration affirmed on 7 November 1998 is to the same effect. Further the term "Perintah tersebut" is unclear as to which order it is referring to. There is nothing in the affidavit that clarifies it. The prayer as such is not supported by the evidence advanced by the applicant.

(b) The Second Respondent

The application against the Second Respondent is:

> Bahawa Inspektor-General Polis, Malaysia memberikan suatu jadual terperinci berkenaan segala pergerakan Dr. Munawar Ahmad Aness dari waktu penahanan beliau pada 14 September 1998 hingga pada waktu beliau dibawa ke Mahkamah Sesyen Kuala Lumpur pada 19 September 1998 di mana beliau telah dituduh dalam Kes Tangkap No. 62-134 of 1998 dan bahawa keterangan lanjut yang diberikan termasuklah:

(i) Tarikh dan waktu pergerakan atau pemindahan;

(ii) Identiti pegawai-pegawai yang membawa beliau atau yang memindahkan beliau;

(iii) Tujuan membawa beliau atau tujuan memindahkan beliau;

(iv) Tempat beliau dibawa.

This part of the application, as worded, is for a detailed schedule of all movements of the applicant from 14 September until production in the Sessions Court on 19 September, including the details in paras. (i) to (iv).

Rule 34 of the Lock-up Rules provide:

> 34. (1) The Officer in Charge shall be responsible that all written laws and rules relating to lockups, prisoners and staff are strictly followed and that discipline and cleanliness are maintained.
>
> (2) The Officer-in-Charge shall maintain or cause to be maintained a Journal (in these Rules referred to as "the Journal") in which shall be recorded all matters and occurrences of importance, including the number of prisoners in custody after each meal, and these entries shall be dated and signed daily.

The Rules does not specify or suggest that the information sought in the application is recorded as matters and occurrences of importance and is available.

It is clear however from the wording in the application that the applicant is seeking for the relevant Respondent to prepare a schedule of information in respect of the applicant and in a format the applicant desires. The respective Respondents are in effect asked to create a schedule from records or data that may or may not exist, and in ordinary parlance, to make a report. There is no authority submitted before this Court for such an undertaking. The Federal Court case of *Dato Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232 FC was cited by counsel. That case however concerns admissibility of the lock-up register. Abdoolcader FJ, delivering the judgment of the Federal Court said:

> There is unfortunately no evidence before us as to the Inspector-General's Standing Orders made under section 97 of the Police Act with regard to the nature and purpose of a station diary and the ambit and extent of the official duty of the person making the entries therein to determine whether section 35 of the Evidence Act indeed applies thereto. The Privy Council held in *Dirgaj Deo Bahadur v. Beni Mahro & Ors*. that if, in the case of official documents admissible in evidence under section 35 of the Indian Evidence Act (which is in *pari materia* with ours), it could be shown that any particular part was in excess of the official duty by reason of which it came into existence, that part

might not be admissible. The lock-up register however is clearly admissible under section 35 of the Evidence Act as it is a journal within rule 34(2) of the Lockup Rules, 1953, and the lock-up register produced has cross-references to entries in the station diaries: this correlation would therefore make all the relevant entries in the station diaries admissible as they would form part of the lock-up register and the two must therefore be read conjointly. When it is the duty of a public officer to make some entries in any public or other official book it is admissible in evidence to prove the truth of the facts entered as well as the fact that the entries were made by him although their authenticity be not confirmed by the usual test of truth, namely, the swearing and cross-examination of the person who prepared them. In any event all the entries were put to Inspector Aziz who confirmed them and they accordingly form part of the evidence before the learned Judge in the *voir dire.*

This application however is concerned with the production of a detailed schedule by the respondents. The court is not concerned with their admissibility, which is a matter under s. 35 of the Evidence Act 1950. The authorities that exist are to produce relevant extracts of records or journals, not a detailed schedule as applied for.

For these reasons alone the application against both respondents may be rejected.

The Third Question

The Prisons Rules makes no provision itself that any of the records kept under the Rules may be produced to any person other than for the use of the prisons authorities.

Similarly in respect of the second respondent. While r. 34(1) requires the Officer-in-Charge to ensure all written laws and rules relating to lockups, prisoners and staff are strictly followed, and r. 34(2) provides that a journal is to be maintained to record all matters and occurrences of importance, the Rules or the Act does not specify what the matters and occurrences of importance. The Rules, while providing rules for accommodation; admission and discharge; treatment of prisoners; visits, letters and privileges; offences and punishment; staff and conduct of subordinate police officers and constables, does not itself, anywhere, provide that the journal that is maintained is to be made available to any party.

That being the case, authority for the production of the information as desired by this application must be sought elsewhere. The Senior DPP thought the application was being made under the Criminal Procedure Code, while Mr Manjeet Singh says the application is under the provisions of the Evidence Act. To my mind the very fact of the argument in this case proves the defect

of the application in not giving sufficient notice as to its basis. Be that as it may, it is necessary to look beyond the Prisons Act, the Prisons Rules and the Lock-up Rules for authority for production.

Nevertheless this brings us to the fourth question.

The Fourth Question

As to what a public officer may be ordered to issue a certified copy of under the Evidence Act is provided in s. 76 of the Evidence Act 1950.

The section provides:

76. Certified copies of public documents.

Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorized by law to make use of a seal, and the copies so certified shall be called certified copies.

Explanation - Any officer who by the ordinary course of official duty is authorized to deliver the copies shall be deemed to have the custody of the documents within the meaning of this section.

From the words of s. 76 it is clear that it applies only to public documents which the applicant has a right to inspect, and upon payment of the legal fees therefor. Thus firstly it must be shown to be a public document, and secondly that the applicant has a right to inspect it, and thirdly he tenders the legal fees therefor.

Firstly as to public documents. A public document is defined in s. 74 of the Evidence Act as:

74. Public Documents.

The following documents are public documents:

(a) documents forming the acts or records of the acts of-

(i) the sovereign authority;

(ii) official bodies and tribunals; and

(iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and

(b) public records kept in Malaysia of private documents.

It is clear from s. 74 that the document must itself form the act or record of the acts of the public officer. *Sarkar on Evidence* 14th ed p. 1078 has this to say with regard to 'acts or records of the acts':

> CLAUSE (1): "Acts or Records of the acts".-In construing s. 74 it may fairly be supposed that the word "acts" in the phrase, "documents forming the acts or records of acts" is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape in a public document. The kind of acts which this section has in view is indicated by s. 78. The acts there mentioned, are all final completed acts as distinguished from acts of a preparatory or tentative character. The enquiries which a public officer may make whether under the Cr P Code or otherwise, may not result in action. There may not be publicity about them. There is a substantial difference between such measures and the specific act in which they result. It is the latter only that this section was intended to apply. Unless the above distinction is drawn, we cannot see where the right of discovery is to stop [per SHEPHARD J, in *R v. Arumugam,* 20 M 189, 196; folld in *Chandi Charn v. Baistab,* 31 C 284: 8 CWN 125]. A memo sent to a magistrate by a Civil Surgeon in compliance with the former's request to report the age of an accused, is not the act or a record of his act as a public officer and it merely embodies the civil surgeon's opinion as an expert *[Abdul Halim v. Saadat Ah,* A 1928 O 155]. It would be an unwarranted restriction on the words "documents forming the acts or the records of the acts", to say that they should be confined to those parts of an income-tax record which the Income Tax Officer has himself prepared and to exclude documents which he has himself called for (eg return, profit and loss statement &c) or which have been admitted to the record for the purpose of the assessment [*Ramarao v. Venkataramayya,* A 1940 M 768 FB].

In *Heyne v. Fischell* 30 TR 190 it was held that documents kept in the post office showing the times telegrams were received and sent were held not to be a public record. However, applying a liberal interpretation, I would hold that a record of matters that a public officer is required by law to maintain is a public document, even though it may be a record of acts of visitation by other persons. The act of recording by the officer is in each case a separate and complete act.

Secondly, the section only applies if it is shown that the application is in respect of a public document which he has a right to inspect. In this regard there is nothing in the Prisons Act and Rules, and the Lock-up Rules that confers a right upon the applicant to inspect those records. Reliance is entirely upon s. 74 and 76 of the Evidence Act.

Sarkar on Evidence 14th Ed p. 1075-1076 has this to say on the right to inspect:

In India there is no separate enactment, except the provisions of s. 76 with regard to the means of obtaining an inspection or copy of public documents. S. 76 provides for the granting of certified copies of public documents which a person has the right to inspect. But it has nowhere been laid down, how the right of inspection of public documents is to be regulated. In *Mutter v. The EM Rly Co,* 1888 LR 38 Ch D 92, 106 LINDLEY LJ, said,-

> When the right to inspect and to take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle and is shown by the judgment in *Rex v. Justices of Staffordshire* [6 Ad & E 84, 99, 101].

This common law right of inspection of public document by a person interested in the document so far as may be necessary for protection of such interest has been recognised in several cases here. A person wishing to avail of the right has to show *prima facie* the interest which needs protection. Persons in custody of public documents are a sort of trustees for such persons. "A right to inspect public documents is however, assumed in s. 76. I think it might be inferred that the legislature intended to recognise the right generally (ie the right to inspect) for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such document should be given" [per SHEPHERD J, in *R v. Arumugam,* 20 M 189 FB. HENDER. SON J, agreed with this in *Chandi Charan v. Baistab, B CWN* 125, 132: 31 C 284: see also *Parasuram v. Cocke,* A 1942 B 26:1942 Born 71]. Right to obtain copies depends upon applicant's right to inspect such documents [*VJ Thomas v. S,* A 1970 K 273]. In *R v. Arumugam, sup* the right of an accused to apply for copies of public documents if they fall under s. 74 and concern the offence with which he is charged was recognised [*S v. Krishnan*, A 1961, M 92, 96]. Under Art 227 of the Constitution the High Court may make rules for the inspection of records. This presupposes that subject to such rules the public have a right to inspect the records of subordinate courts and the only valid reason for refusing inspection would be that the inspection of the particular record was against public interest [*Ladli v. R,* 53 A 724: A 1931 A 364]. Subject to rules that may be made by the High Court, a judge or a magistrate has a discretion to allow inspection of record, but the discretion is to be exercised judicially. The right to a certified copy presupposes a right of inspection. It is altogether unreasonable to insist that a party must take certified copies of all documents on the record in order to determine of which documents he really requires copies. Therefore *prima facie*, under s. 548 [now s 363(5)] Cr P Code a party would have an implied right to ask the court to allow inspection of the record [*Parasuram v. Coke, sup*].

Thus what is relied upon here is the common law right as a person having an interest in the record. Such a right was recognised in *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24 FC, in respect of the right of inspection of a first information report. It was held also since it is admissible under s. 77 of the Evidence Act a copy is to be supplied. It is to be noted that what is ordered to be supplied is a certified copy.

Thirdly, he tenders the legal fees therefor. Sarkar, continuing from the paragraph above at p. 1076 has this to say:

> S. 76 gives the right to obtain a certified copy of a public document which any person has a right to inspect on payment of legal fees. The right to obtain a certified copy therefore presupposes the right to inspect. But a right of inspection does not necessarily carry with it a right to take copies. It was held that statute which gives a person a right of inspection gives him no right to take copies himself, because the statute gives him a right to have copies on payment, and there was no ground for implying any other right [in *re Balaghat G M Co*, 1901, 2 KB 657; *Ormerod Grierson & Co v. St George's* 1 W Ltd, 1905, 1 Ch 506,512]. Following these cases it has been held that in the case of a statutory right of inspection, the court will not imply a right to take copies, unless the right would otherwise be of no avail or practically useless [*Rameswar v. Calcutta W & S Assn*, 42CWN 161].

There is no undertaking or offer to pay any fees in the letters to the respondents. The orders applied for does not provide that the orders are subject to the payment of any relevant fees.

Conclusion

The foregoing shows the document must be a document that is existing, being the act or the record of the acts of the public officer. Then only does s. 76 provide for certified copies of that public document to be made. There is clearly no provision to require the public officer to prepare a "jadual terperinci" as is prayed for in this application. The application in this case is not for any record that demonstrably exists.

As to the other defects in the application referred to above, I have only this to say. There is no sign of the usual cure-all prayer "And such other orders as the court thinks fit". That would have allowed the court to consider other orders. Why this is not included is not for the court to speculate. In the circumstances I am constrained to make this decision on the application as it stands.

For the foregoing reasons I would reject this application.